No. 15203

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN,

Appellant,

vs.

R. A. RIDDELL,

Appellee.

On Appeal From the United States District Court for the Southern District of California Southern Division

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OPENING BRIEF FOR THE APPELLANT

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OPINION BELOW

The Findings of Fact and Conclusions of Law [R. 31] of the District Court are not officially reported.

STATEMENT OF JURISDICTION

This action arose in the United States District Court for the Southern District of California, Southern Division, under the jurisdiction granted by Section 1340 of Title 28 of the United States Code.

The Appellant sought an injunction restraining and enjoining the Appellee from making any seizure, collection or distraint of any property belonging to Appellant under the authority of an assessment of income taxes, interest and penalties made by the Commissioner of Internal Revenue against Appellant for the calendar year 1951.

Appellee made a motion to dismiss Appellant's complaint on the grounds that the Court lacked jurisdiction and the complaint failed to state a claim upon which relief could be granted. The motion was supported by an affidavit and the Court treated the motion to dismiss as a motion for summary judgment under Federal Rule of Civil Procedures 12(b).

The matter was heard on the pleadings and affidavits. On May 8, 1956, the Court made an order that Appellee was entitled to judgment, that the complaint be dismissed with prejudice and that the prayer for injunction be denied. [R. 36]

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291. The order is final and appealable.

Appellant filed Notice of Appeal on June 7, 1956. [R. 37]

Appellant made a motion for an injunction pending the appeal [R. 37] which was granted. Appellant posted security of a value of $12,000.00 to protect Appellee's rights pending appeal and for costs.

On July 12, 1956, Appellant filed a designation of contents of record on appeal and reporter's transcripts of proceedings.

The record was prepared by the Clerk of the United States District Court, who filed the same with the Clerk of the United States Court of Appeals for the Ninth Circuit on July 17, 1956. [R. 69, 70] Appellant filed a statement of points on appeal in the United States Court of Appeals for the Ninth Circuit on July 24, 1956.

QUESTIONS PRESENTED

1. Whether under Section 6212(a) of the Internal Revenue Code of 1954, which authorizes the Secretary of the Treasury or his delegate (hereafter referred to as "Commissioner") to send a notice of deficiency of income taxes to a taxpayer by registered mail, a notice of deficiency sent by ordinary mail is valid.

2. Whether the enforcement or collection of an assessment of income taxes, interest and penalties based upon a notice of deficiency sent by ordinarily mail may be enjoined.

3. Whether it was necessary for Appellant to file a petition for a redetermination of the deficiency with the

Tax Court of the United States before seeking injunctive relief.

STATUTES INVOLVED

The pertinent statutes are printed in the Appendix, *infra.*

STATEMENT

The facts are not in dispute.

On March 11, 1955, the Commissioner of Internal Revenue sent a Notice of Deficiency for the calendar year 1951 to the Appellant by registered mail. The notice was not sent to Appellant's last known address and was returned to the Commissioner by the Post Office Department. Appellee conceded that the notice mailed March 11, 1955 was ineffective. [R. 14] The District Court concluded that such notice was of no legal efficacy as a statutory notice of deficiency. [R. 35]

Appellant made and filed a federal income tax return for the calendar year 1951 on or prior to March 15, 1952. [R. 32] The normal period within which a deficiency could be assessed for the year 1951 expired on March 15, 1955.

On April 14, 1955, the Commissioner mailed a Notice of Deficiency to Appellant by ordinary mail, correctly addressed, which was received by Appellant on April 15, 1955. [R. 33] The Notice of Deficiency recited that Appellant had a deficiency for the calendar year 1951 of $6,490.77 income tax and $3,245.39 in penalty. [R. 32] The penalty was explained as follows:

"The 50% penalty shown herein has been asserted in accordance with the provisions of Section 293(b) of the Internal Revenue Code of 1939." [R. 21]

The Appellant did not file a petition for redetermination of the deficiency with the Tax Court of the United States. [R. 34]

On July 22, 1955, the Commissioner assessed against Appellant the income taxes and penalties proposed in the Notice of Deficiency, together with interest in the amount of $1,305.62. [R. 33]

On November 22, 1955, Appellee gave written notice and demand for payment of the assessment and, on the same date, issued a warrant for distraint. [R. 33]

Appellee has threatened, and is threatening, to distrain, seize and sell real and personal property owned by Appellant and to apply the proceeds thereof to the payment of the assessment. Unless restrained Appellee will levy upon, seize and sell Appellant's property ,and all other property which Appellant may hereafter own or acquire. [R. 34]

I

ARGUMENT

A NOTICE OF DEFICIENCY SENT BY ORDINARY MAIL CONTRARY TO STATUTE IS INEFFECTIVE FOR ANY PURPOSE

The appeal presents the primary question of whether a notice of deficiency sent in a manner not authorized by statute is a valid statutory notice.

It is mandatory for the Commissioner to give notice of a deficiency by registered mail.

Section 6212(a), IRC 1954, provides:

> "If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A and B, he is *authorized* to send notice of such deficiency to the taxpayer *by registered* mail." [Emphasis added]

Section 6213, IRC 1954, provides in part:

> "Within 90 days . . . after the notice of deficiency *authorized* in section 6212 is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in Section 6861 [relating to jeopardy assessments not here involved] no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in Court for its collection shall be made, begun, or prosecuted *until such notice* has been mailed to the taxpayer . . . " [Emphasis added]

These provisions are substantially the same as Section 272(a) of IRC 1939.

The proper mailing of a notice of deficiency is essential to suspend the statute of limitations on assessment and collection; to set in operation the statutory period within which the taxpayer may appeal to the Tax Court, and is a condition precedent to assessment of a deficiency and the commencement of distraint or other proceedings for collection of the tax. [Sections 6212(a), 6213, IRC 1954; Section 272(a), IRC 1939]

The Tax Court has consistently held that mailing a notice of deficiency by ordinary mail does not comply with the statute so as to give the Court jurisdiction.

In *John A. Gebelein, Inc. v. Commissioner*, 37 B.T.A. 605, the Commissioner of Internal Revenue sought to obtain a dismissal of a taxpayer's petition for redetermination on the ground, among others, that there was no statutory notice of deficiency because it was not sent by registered mail. In agreeing with the Commissioner the Board of Tax Appeals, now the Tax Court, stated:

> "The statute says that if the Commissioner determines a deficiency he is authorized to notify the taxpayer thereof by registered mail. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Worsted Mills v. United States*, 278 U.S. 282. See *Henry M. Day*, 12 B.T.A. 161. Since the notice attached to the petition was not sent by registered mail, it may not be regarded as an authorized notice of deficiency. *Heinemann Chemical Co. v. Heiner, supra.* The petition is therefore prematurely filed and, for want of jurisdiction, the proceeding must be dismissed."

In *Oscar Block, et al v. Commissioner*, 2 T.C. 761, the Tax Court reiterated this position and stated:

> "Congress clearly stated that the mailing should be by registered mail and that the 90-day period should start from that date. It undoubtedly had a purpose in this and one of its purposes was, no doubt, to eliminate, as far as possible, any uncertainty as to the beginning of this critical period. A holding for the

> petitioners in this case would deprive the statute of some of the important benefits which Congress intended should be derived from it. The petitioners have failed to allege facts which would give the Court jurisdiction in this proceeding."

See also *Midtown Catering Co. v. Commissioner*, 13 T.C. 92, at page 95.

> "It is to be noted that Congress, through the provisions of Section 272(a)(1) [now Sections 6212(a) and 6213, IRC 1954] has carefully outlined the steps the Commissioner of Internal Revenue must take in moving to the assessment and collection of deficiencies in income tax and, similarly, has prescribed the steps a taxpayer may take if he desires to litigate such liability through the Tax Court of the United States. First, the Commissioner, upon the determination of a deficiency, is 'authorized' to send notice of such deficiency to the taxpayer by registered mail and, while by terms the sending of a notice by registered mail appears to be permissive, the provisions of the section which follow indicate that such procedure is mandatory, if the tax is to be finally determined and collected." *Rebecca S. Hamilton v. Commissioner*, 13 T.C. 747, at 749.

The fact that the taxpayer actually received the notice mailed by ordinary mail does not affect the result. In order to have a statutory notice of deficiency registered mail is a prerequisite. Personal service of a notice of deficiency has been held insufficient. *Henry M. Day v. Commissioner*, 12 B.T.A. 161, at 163. "Any other method of notice does not comply with the statute and is invalid. The method

directed by the statute is mandatory." *Heinemann Chemical Co. v. Heiner, Collector of Internal Revenue*, 92 F.2d 344, CCA-3 (1937). Furthermore, if the notice of deficiency is sent by registered mail properly addressed, the fact that it is never received by the taxpayer does not affect the validity of the notice. *Alma Helfrich v. Commissioner*, 25 T.C. ......, No. 51; *Dolezilek v. Commissioner*, 212 F.2d 458, (D.C. Cir. 1954) In the latter case the notice was sent by registered mail, properly addressed, but was returned by the Post Office Department "Unclaimed—Refused", and was later delivered by a Deputy Collector in person. It was held that the date of mailing the notice was controlling rather than the date of actual receipt.

Since the notice of deficiency was not sent by registered mail, it may not be regarded as an authorized notice of deficiency and it was therefore ineffective for any purpose.

II

THE ENFORCEMENT OR COLLECTION OF AN ASSESSMENT BASED UPON A NOTICE OF DEFICIENCY SENT BY ORDINARY MAIL MAY BE ENJOINED

Subject only to two qualifications, one statutory and one equitable, a taxpayer cannot maintain a suit for the purpose of restraining any proper officer from assessing or collecting a Federal tax. The statutory exception to this general rule relates to premature attempts to collect a tax, and the equitable exception, to cases of extraordinary hardship.

The general rule forbidding actions to restrain the collection of taxes is expressed in Section 7421 of the Internal Revenue Code of 1954 as follows:

> "(a) Tax.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The statutory exceptions to this general rule which are here applicable are Sections 6212(a) and 6213(a), IRC 1954:

Section 6212(a) provides:

> "Sec. 6212. NOTICE OF DEFICIENCY. (a) IN GENERAL—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail."

Section 6213(a) provides in part as follows:

> "Within 90 days, . . . after the notice of deficiency authorized in section 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, . . . Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or

levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

Under these sections, the Secretary of the Treasury, or his delegate, is "*authorized* to send notice of such deficiency to the taxpayer by *registered mail*." "Within 90 days . . . after the notice of deficiency *authorized* in section 6212 is *mailed* . . ." the taxpayer has the right to petition the Tax Court for a redetermination. Section 6861 referred to in Section 6213(a) relates to jeopardy assessments and except for such assessments "no assessment of a deficiency in repect of any tax . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted *until such notice* has been mailed to the taxpayer, . . ."

If the Commissioner makes an assessment of a deficiency, or a levy, or commences a proceeding in Court for the collection of an assessment without first having given the notice authorized by Section 6212(a), Section 6213(a) specifically authorizes injunctive relief.

The plain and sole purpose of Section 6213(a), IRC 1954, is to guarantee to the taxpayer that he shall not be deprived of the administrative process, with appeal to the Tax Court. *Ventura Consolidated Oil Fields v. Rogan,* 86 F.2d 149, at 155, CCA-9; *Van Antwerp v. U.S.*, 92 F.2d 871, at 874, CCA-9.

If the Appellee is not enjoined, there will be a seizure of Appellant's property without due process of law.

A taxpayer is entitled to a valid notice of deficiency. The notice, if valid, gives the taxpayer the important right to petition the Tax Court for a review of the Commissioner's determination without first paying the tax. The purpose

of the statutory exception to the general rule prohibiting injunctions is to guarantee this right to the taxpayer. If the notice is not given as required by the statute, the Tax Court will not entertain jurisdiction and the taxpayer is deprived of this remedy. To permit an assessment to be enforced without a valid statutory notice of deficiency would give the Commissioner the right to grant or withhold the right of appeal to the Tax Court at will. It is respectfully submitted that the purpose of Section 6213(a) of the Internal Revenue Code of 1954 is to prevent this result.

> "There is nothing inequitable in the relief asked by the plaintiffs. It is the very relief accorded them by and under the precise terms of the statutes making a violation of its terms an express exception to the general prohibition of section 3652(a) [now section 7421(a)]. An essential part of the whole statutory scheme of furnishing the taxpayer with an option either to pay and sue to recover back or to apply for relief to the Tax Court, section 272(a)(1) [now Section 6213(a)] was not enacted as a mere idle gesture. The commissioner is as bound as the taxpayer is by its terms. This is made plain not only in the language of the statute but in the language of the cases construing and applying it, . . ." *Maxwell v. Campbell,* 205 F.2d 461, at 463 CCA-5.

The Appellee contended in the lower Court, and the Court found, that since the Notice of Deficiency asserts a penalty under Section 293(b) of the Internal Revenue Code of 1939, the assessment is valid even though notice was mailed more than three years from the due date of the

return. [R. 35] If Appellee's position is correct, no prejudice would be suffered by requiring that a new notice of deficiency be sent in the manner authorized by the statute. This would impose upon the Commissioner the simple task of sending a new notice of deficiency by registered mail. This burden should be contrasted with the fact that the procedure followed by the Commissioner has deprived the taxpayer of his right of appeal to the Tax Court.

III

IT WAS NOT NECESSARY FOR APPELLANT TO FILE A PETITION WITH THE TAX COURT BEFORE SEEKING INJUNCTIVE RELIEF

The notice of deficiency is the final administrative determination of the Commissioner. This notice gives the taxpayer the right to appeal to the Tax Court for a redetermination. "It is the notice of the final determination of the deficiency contained in the 'registered letter' that gives the taxpayer the right to appeal. Until such notice of the final determination of the deficiency had been sent in the present case by 'registered mail' as the statute required, so that appeal might be taken to the Board the Collector did not have the right to seize the money belonging to the taxpayer." *Heinemann Chemical Co. v. Heiner,* 92 F.2d 344, CCA-3.

Reviewable agency action before the Tax Court is predicated upon a final determination by the Secretary of the Treasury or his delegate. Interlocutory agency action

is not reviewable by the Tax Court. A notice of deficiency sent by registered mail is the final determination which will confer jurisdiction upon the Tax Court. Notice by any other means is not a final, reviewable agency action.

A taxpayer is not required to go through the meaningless gesture of filing a petition with the Tax Court for the purpose of being told by the Tax Court that it has no jurisdiction.

CONCLUSION

It is mandatory that a notice of deficiency be sent by registered mail as authorized by the statute. If sent by ordinary mail, it is ineffective for any purpose.

Where a notice is not sent by registered mail the taxpayer is specifically granted the right by statute to seek injunctive relief in the proper Court, which is the United States District Court.

Without a valid notice of deficiency there is no final determination upon which a taxpayer could seek review by the Tax Court. The taxpayer has, therefore, no administrative remedy to exhaust.

The Judgment and Order of the District Court should be reversed.

Respectfully submitted,

TORRANCE & WANSLEY
By: John A. Brant,
Attorneys for Appellant

October, 1956

SEC. 6212. NOTICE OF DEFICIENCY

[Sec. 6212(a)]

(a) IN GENERAL.— If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.

Source: Sec. 272(a) (part), 871(a) (part), 1012(a) (part), 1939 Code, substantially unchanged.

[Sec. 6212(b)]

(b) ADDRESS FOR NOTICE OF DEFICIENCY.

(1) INCOME AND GIFT TAXES.— In the absence of notice to the Secretary or delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

Source: Secs. 272(k), 1012(j), 1939 Code.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

[Sec. 6213(a)]

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.— Within 90 days, or 150

days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Source: Secs. 272(a) (part), 871(a) (part), 1012(a) (part), 1939 Code, substantially unchanged.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

[Sec. 7421(a)]

(a) TAX.— Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Source: Sec. 3653(a), 1939 Code.

INTERNAL REVENUE CODE OF 1939

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) PETITION TO BOARD OF TAX APPEALS.— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of

Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * *

(b) FRAUD.— If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).